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**Datasheet for the decision
of 11 April 2024**

Case Number: T 1478/22 - 3.3.05

Application Number: 15802579.1

Publication Number: 3152795

IPC: H01M10/0562, H01M4/131,
H01M4/1391, H01M10/052,
H01M4/02, H01M4/62, H01M4/485

Language of the proceedings: EN

Title of invention:
ELECTRODE MATERIALS WITH MIXED PARTICLE SIZES

Patent Proprietor:
QuantumScape Battery, Inc.

Opponent:
STRAWMAN LIMITED

Headword:
Electrode materials/QuantumScape

Relevant legal provisions:
EPC Art. 108
RPBA 2020 Art. 13(2)

Keyword:

Admissibility of appeal - (yes)

Amendment after summons - exceptional circumstances (no)

Decisions cited:

T 2558/16, T 1800/21

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1478/22 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 11 April 2024

Appellant: QuantumScape Battery, Inc.
(Patent Proprietor) 1730 Technology Drive
San Jose, CA 95110 (US)

Representative: J A Kemp LLP
80 Turnmill Street
London EC1M 5QU (GB)

Respondent: STRAWMAN LIMITED
(Opponent) Winnington House
2 Woodberry Grove
North Finchley
London
N12 0DR (GB)

Representative: Keilitz Haines & Partner Patentanwälte PartGmbH
Nigerstraße 4
81675 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 April 2022 concerning maintenance of the
European Patent No. 3152795 in amended form.**

Composition of the Board:

Chairman E. Bendl
Members: G. Glod
P. Guntz

Summary of Facts and Submissions

- I. The patent proprietor's (appellant's) appeal lies from the opposition division's decision finding that the European patent No. 3 152 795 as amended on the basis of then auxiliary request 1 met the requirements of the EPC.
- II. With the grounds of appeal the appellant filed a main request and 16 auxiliary requests.
- III. In the communication under Article 15(1) RPBA, the board expressed the preliminary opinion that the appeal was likely to be dismissed.
- IV. In reply the appellant filed a new main request and auxiliary request 1 replacing all requests on file.

Claim 1 of the main request reads as follows
(differences as compared with claim 9 of the patent as granted are underlined and struck through):

*"1. A solid state electrochemical electrode comprising:
active materials characterized by a first particle size
distribution having a first median particle size;
catholyte materials characterized by a second particle
size distribution having a second median particle size;
wherein the volumetric ratio of active materials to
catholyte materials is from 99:1 to 1:1;
wherein the particle size ratio of the first median
particle size to the second median particle size is at
least 3:1 or greater;
wherein the median diameter is a volume averaged median
particle size determined by SEM; and*

wherein the electrode is characterized by a porosity of less than 10% by volume as determined by SEM-; and wherein the catholyte materials are sulphide-based catholytes."

Compared with claim 1 of the main request, claim 1 of auxiliary request 1 includes the following amendments at the end of the claim (differences as compared with claim 1 of the main request are underlined and struck through):

"1. [...] characterized by a porosity of less than 10% by volume as determined by SEM-; and wherein the catholyte materials are sulphide-based catholytes electrolytes which include lithium, phosphorus, and sulfur and optionally one, two, or three additional elements."

V. The appellant's arguments, as far as relevant to the present decision, can be summarised as follows.

The new requests were based on auxiliary requests 2 and 3 filed with the grounds of appeal. Auxiliary request 2 had already been submitted during oral proceedings before the opposition division, but the opposition division had refused to allow such a request. The board's communication under Article 15(1) RPBA was the first time an EPO department had indicated that the dispersity feature could lead to a problem of sufficiency of disclosure.

The new requests did not lead to any new problems since they had been obtained merely by deleting claims from the previous auxiliary requests 2 and 3. Therefore they were beneficial to procedural economy and should be taken into account.

VI. The respondent (opponent) argued that the appeal was not admissible. If the appeal were considered admissible, the requests should not be taken into account in accordance with Article 13(2) RPBA.

VII. At the end of the oral proceedings on 11 April 2024, the requests were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be maintained as amended on the basis of the main request or auxiliary request 1, submitted by letter of 9 February 2024. All other auxiliary requests had been withdrawn.

The respondent requested that the appeal be rejected as inadmissible or that it be dismissed.

Reasons for the Decision

1. Article 108 EPC

The respondent argued that the entire appeal was inadmissible in view of the inadmissibility of all the claim requests.

The board does not share this view. Even though the claim requests submitted with the grounds of appeal potentially will not be admitted into the appeal proceedings, the admissibility of the requests does not dictate the admissibility of the appeal.

The appellant is adversely affected by the decision under appeal and has set out detailed grounds why, in its view, the reasoning given in the decision under appeal is incorrect.

Where amended claims are filed, the admissibility of the appeal does not depend on whether the board later admits those claims into the proceedings or whether the appellant's case is ultimately convincing (T 2558/16, Reasons 6).

Thus, the board does not see any reason to consider the appeal per se inadmissible.

2. Article 13(2) RPBA 2020

Under Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The main request is based on auxiliary request 2 filed with the statement setting out the grounds of appeal. It differs from that auxiliary request on account of the deletion of claims 1 to 8, 10 and 14. In a first step it needs to be established whether the new requests constitute an amendment to the case.

Even if it were accepted that auxiliary request 2 had already been submitted during the oral proceedings before the opposition division and should have been admitted by the opposition division, the now main request would still constitute an amendment to the case (see T 1800/21, Reasons 3.3, from this board in a different composition). The same clearly applies to auxiliary request 1, which is based on auxiliary request 3 filed with the statement setting out the grounds of appeal. It is not disputed that the latter

request was never submitted before the opposition division.

In a second step it needs to be evaluated whether exceptional circumstances would justify taking the new requests into consideration. In the case in hand there are no exceptional circumstances, for the following reasons.

The current main request and auxiliary request 1 were submitted after the board's communication pursuant to Article 15(1) RPBA, which indicated, among other things, that the board was not convinced that the patent contained enough information on how to achieve the dispersity of 0.25 or less for both the ion conductive material and the electrochemically active material.

The objection concerning the dispersity was first raised in the notice of opposition (see point IV.2 on pages 11 and 12). This objection was part of the opposition proceedings and was dealt with by the opposition division under point 2.2.3 of the impugned decision. The objection was reiterated on pages 21 to 25 of the respondent's reply to the appeal. The appellant waited until it had received the communication pursuant to Article 15(1) RPBA before filing a request addressing that objection.

In the communication pursuant to Article 15(1) RPBA the board's reasoning was based only on arguments which had been part of the proceedings since the filing of the opposition. There were no new facts which would have triggered the filing of a new request at such a late stage of the proceedings. The communication cannot per se be regarded as creating exceptional circumstances

(Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, V.A.4.5.6(c)).

Generally, patent proprietors have to anticipate that the board might evaluate a case differently from what they might have expected. Therefore the appellant should have reacted to all the respondent's objections immediately, even if it considered them to be completely without substance. A party is supposed to react to the other party's case and not only to the opinion of an EPO division. The communication pursuant to Article 15(1) RPBA 2020 is not an invitation to make new submissions (Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, V.A.4.5.6(a)).

The board is aware of cases in which account was taken of a request that had been submitted after notification of the communication pursuant to Article 15(1) RPBA and amended only by the deletion of claims. These cases relate to requests that did not shift the case, did not necessitate a new discussion and were prima facie allowable (T 1800/21, Reasons 3.4.5 to 3.4.8 and Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, V.A.4.5.5(g)).

In the case in hand the situation is different. Compared with claim 1 as granted, claim 1 of the main request and of auxiliary request 1 includes features taken from the description. The appellant has not provided any reasons why the objections raised by the respondent in its reply to the appeal on pages 63 to 66 against what were then auxiliary requests 2 and 3, in particular with respect to Articles 84 and 56 EPC, were overcome. Consequently, filing these requests would entail a discussion of new features not originally present in any of the claims. This clearly qualifies as

a shift of the case contrary to what is set out in T 1800/21 mentioned above.

Therefore, the main request and auxiliary request 1 are not taken into account and are thus not part of the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated